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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

JOHN A. MANDACINA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID B.B. HELFREY
Counsel of Record

MARK W. HAGEMEISTER
HELFREY, SIMON & JONES, P.C.
Attorneys for Petitioner

120 S. CENTRAL AVENUE, SUITE 1500
ST. LOUIS, MISSOURI 63105
(314) 725-9100
(314) 725-5754

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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QUESTIONS PRESENTED

The first question presented is whether the Court of Appeals has impermissibly expanded the standard of what constitutes "evidence that a movant can discover through his own reasonable investigation" in violation of the defendant's Due Process rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963).

The second question presented is whether the Court of Appeals correctly ruled that the amended Brady and ineffective assistance claims in Petitioner's supplemental motion to vacate his conviction did not relate back to the original motion.

The third question presented is whether the Court of Appeals correctly ruled that the amended *Brady* and amended ineffective assistance claims in Petitioner's supplemental motion were not filed within one year of the date on which the facts supporting the claims could have been discovered through the exercise of due diligence under 28 U.S.C. §2255(4), or within one year of the date on which the impediment to making a motion created by Governmental action in violation of constitution or laws of the United States was removed.

The final question presented is whether the Court of Appeals correctly applied the actual innocence standard when it denied the movant a gateway to avoid procedural default without requiring the government's disclosure of the exculpatory evidence at issue or an evidentiary hearing after permitting counsel to review the undisclosed material and explore its potential fruits.

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Petition John A. Mandacina respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which was entered in this case on May 16, 2003.

OPINIONS BELOW

The opinion of the United States District Court is reported at 2001 U.S. Dist. Lexis 10971 (W.D. Mo. 2001) and is included in the appendix attached hereto at page A-1. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 328 F.3d 995 (8th Cir. 2003), and is included in the appendix attached hereto at page A-25. The Court of Appeals denied rehearing by the panel and rehearing en banc on July 22, 2003 and the denial is included in the appendix attached hereto at page A-39.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On May 16, 2003 the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court, *Mandacina v. United States*, 328 F.3d 995 (8th Cir. 2003). A timely petition for rehearing by the panel or, in the alternative, for rehearing en banc, was filed. That petition was denied on July 22, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law...

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the District wherein the crime shall have been committed;...and be confronted with the witnesses against him.

Title 28, United States Code, Section §2255 provides in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by Governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of the due diligence.

STATEMENT OF THE CASE

1. The government conducted an investigation of alleged illegal gambling activities. That investigation resulted in the indictment of Petitioner John Mandacina, and nine others, including the informant, Larry Strada.

2. It is the government's theory that Petitioner believed the informant was cooperating with the government in the gambling prosecution and that, in an act of retaliation, Petitioner participated in a conspiracy to murder the informant, and that Petitioner's role in the conspiracy was to offer money to Patrick McGuire to murder the informant. The informant was murdered on May 16, 1990.

3. On May 14, 1993, based upon information provided by two bank robbers seeking reductions in sentence, Petitioner and McGuire were indicted and charged with various offenses, including conspiracy to retaliate against a government witness. Petitioner was convicted and sentenced to life plus five years. The United States Court of Appeals for the Eighth Circuit affirmed Petitioner's convictions over the dissenting opinion of Judge Morris Sheppard Arnold, who opined that there was insufficient evidence to support the conviction of using interstate commerce in the commission of the retaliation. *United States v. McGuire*, 45 F.3d 1177, 1189 (8th Cir. 1995) (concurring and dissenting).

4. Prior to this murder, Petitioner had entered a plea of guilty and been sentenced to 12 months confinement in the gambling case.

5. The only evidence offered against Petitioner at trial was the testimony of two cooperating witnesses. These witnesses were two bank robbers named Earlywine and Dodds. They claimed that Petitioner hired their partner in the bank robberies, Patrick

McGuire, to kill the informant in retaliation for his alleged cooperation with the Government in the gambling investigation. Dodds and Earlywine received cash payments and substantial reductions in their sentences. In written and initialed statements, Dodds and Earlywine implicated four others as participating in the offer of money to McGuire. However, at trial, they testified that Petitioner alone offered McGuire money to kill Strada. Their trial testimony was inconsistent with each other and it directly contradicted their earlier statements. The Government also presented uncorroborated evidence from a third witness, Frank Angotti, who testified that McGuire admitted to killing Strada. (Tr. 1091).

6. Petitioner timely filed his original motion to vacate or set aside conviction and sentence pursuant to 28 U.S.C. §2255 on April 23, 1997. In that motion, Petitioner, among other things, requested evidence obtained by the Gladstone Police Department and detectives involved in the investigation of Strada's murder and evidence of his cooperation with the Government. Petitioner also argued that trial counsel was ineffective for failing to investigate these materials. The Government responded that certain information was turned over and that the remainder of the Gladstone Police Department (Metro Squad) files was not exculpatory. During that time, Petitioner's investigatory efforts continued, in part through the efforts of a private investigator.

7. In that process, Petitioner's counsel discovered the existence of undisclosed exculpatory evidence. This was accomplished by working backwards from an overheard confession by an individual who had every reason, ability and opportunity to murder Strada. The private investigator investigated an allegation by Kevin Cummings that an individual named Charles St. John

had confessed to killing Strada. The investigator was able to support a defense theory that others – known to the government – had a motive and opportunity to murder Strada. This exculpatory information should have been disclosed to Petitioner's trial counsel before trial.

8. The District Court entered a partial order on September 7, 2000 denying several claims and permitting Petitioner additional discovery regarding others. Petitioner filed a Motion to Set Aside or Reconsider the Court's Memorandum and Order and/or for Leave to File a Supplemental Motion on September 26, 2000. Petitioner filed therewith a Supplemental Motion to Vacate or Set Aside Conviction which included additional arguments formulated as a result of Petitioner's continuing investigation (the "Amended Claims") as summarized below.

9. On October 10, 2000, the Government responded arguing that the Supplemental Motion constituted a second or successive petition. The Court requested briefs as to whether the Amended Claims in the Supplemental Motion were time-barred under 28 U.S.C. §2255. On February 16, 2001, Petitioner filed his brief, which included numerous exhibits and affidavits presenting information discovered within one year of the filing of the Supplemental Motion. On July 25, 2001, the court denied Petitioner's Motion to Set Aside or Reconsider the Court's Memorandum and Order and/or for Leave to File a Supplemental Motion. The Amended Claims were stricken and the remainder of the claims in Petitioner's original motion were denied.[1] Petitioner timely filed a Motion to Alter or Amend Judgment on

[1] The court's opinion erroneously stated "It is notable that McGuire's guilt is no longer in question." Neither the government's nor petitioner's counsel knows of any basis for this statement.

August 8, 2001 which the Court denied on August 14, 2001. A Notice of Appeal was filed October 11, 2001. An Application for Certificate of Appealability was filed October 15, 2001.

10. Petitioner's Amended Claims included claims of alleged Brady violations and ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Three weeks before trial, the District Court, after an *in camera* review, forced the government to disclose a report of an interview of Strada's girlfriend, Donna Borland. Borland identified names on a police list as Strada's drug dealing associates who killed Strada for snitching.[2] The government never disclosed the list of suspects or other information provided to the authorities by Borland.

11. As important, the government never disclosed the evidence, interviews and reports leading to the preparation of the list of people the Metro Squad suspected were responsible for Strada's murder or the subsequent investigation corroborating Borland's claims. None of this information was included in the

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[2] Government counsel sent Mandacina's trial counsel a report of a May 19, 1990 interview with Donna Borland ("Borland Report"), by two Gladstone Missouri Police Detectives. According to the report, Borland told the detectives the victim was involved in "fronting money for others to buy drugs." Borland further told the detectives that the murder "was done because [the victim] had turned some information and names over to the authorities in reference to the buying and selling of drugs." Borland did not provide the detectives with specific names, but said, "they were some of the people...mentioned earlier" by the detectives. The detectives had previously read Borland a list of names collected in the investigation. Near the end of the interview, Borland told the detectives that "six or seven people [were] indicted and this was done within the past six months." Borland also told the detectives they needed "to identify and talk with these people, as this is probably where the 'hit' came from."

Borland Report or in the discovery provided to defense counsel. Investigation developed subsequent to Charles St. John's overheard confession established that this undisclosed list of suspects included Charles St. John and his brother Steven. Both of these individuals were identified by Borland and both were, in fact, indicted along with 5 others for drug dealing shortly after the informant's cooperation and proffer. The government did not disclose any reports of any investigations of the St. Johns or of the other individuals Borland identified during her interviews. Further, the government did not disclose the indictments of the St. Johns for drug dealing or that the drug indictments were pending at the time of the informant's murder. Nor did the government disclose that the St. Johns were known associates of the informant. The government also withheld the interviews of Steven St. John by the Metro Squad and the FBI and his grand jury testimony. The government never even disclosed that these reports and information existed. Steven St. John's grand jury testimony directly contradicted Frank Angotti's trial testimony as to Angotti's basis for eliciting McGuire's alleged admission. The government also failed to disclose that it granted immunity to Steven St. John to testify before the grand jury. The government failed to disclose Angotti was on probation when he testified, had been threatened by the government, and that Angotti had been granted assurances in return for his statements and testimony. To this day, none of this exculpatory evidence has been disclosed to the Petitioner, nor has Petitioner been given an evidentiary hearing to present this exculpatory evidence in a courtroom.

12. Petitioner's trial counsel did not investigate the Borland Report or Borland's accusations and failed to secure from the government the list of names Borland identified, and failed to obtain the supporting evidence

that led the police to suspect individuals other than Petitioner. Trial counsel failed to determine that some of the individuals Borland identified had been indicted for drug offenses in the months prior to the murder and were facing significant prison sentences at the time of Strada's murder.[3] Defense counsel failed to investigate and present evidence that these individuals were friends of Strada, were aware of his daily routines, knew he carried a gun, had the ability to approach Strada in his driveway without arousing alarm, and could have gained access to Strada's handgun and used it to murder him.

13. The only physical evidence available in this case corroborated a defense theory that one of the St. Johns murdered Strada. The autopsy indicated a contact wound on Strada's chest wherein the gun muzzle was pressed directly against him when it was fired. Only someone he knew could get this close without a struggle or without Strada running away, and McGuire did not know him.

14. The remaining four wounds were at a 45 degree upward angle as if Strada was in a prone position. No weapon was found but the shells at the scene matched the brand and caliber of the cartridges in the Strada home.

15. An interview of Charles St. John revealed information that could only be known by the murderer. Charles St. John stated that he believed Strada was a snitch, he knew Strada carried a gun and he stated that Strada set his handgun down prior to taking out the trash, just seconds before his murder. This last detail is not contained in any police report or newspaper article regarding the murder. No weapon was recovered at the

[3] Unlike Petitioner who had already pled and been sentenced to only 12 months for taking sports bets in his position as a bartender.

scene and Strada did not have his gun. Footprint casts made by detectives at the crime scene more closely matched Steven and Charles St. John than McGuire.

16. Viewed in its entirety, the evidence resulting from the post trial investigations was not available to trial counsel or the jury. This evidence would have produced a strong case against the St. Johns and would have substantially weakened the case against the Petitioner. The failure to properly investigate and develop this evidence for presentation at trial resulted from both trial counsel's ineffective assistance and the Brady violations by the government. The "defense" primarily consisted of the cross-examination of Dodds and Earlywine. Trial counsel, apparently in an attempt to make a "dramatic" point, chose not to cross-examine Angotti – whose testimony was purportedly limited to McGuire – despite the incredibly prejudicial nature of Angotti's uncorroborated testimony.

17. Frank Angotti testified that he learned from Steven St. John that Patrick McGuire had killed Larry Strada, and that was why he asked McGuire if he did it. A subsequent interview of Steven St. John by Petitioner's investigator revealed that St. John was given immunity and that the Assistant U.S. Attorney was very angry when he testified in the grand jury that he had never spoken to Frank Angotti about Strada's murder or anything else. The Steven St. John interviews, reports and grand jury testimony, which could have been used to discredit a key government witness, were never disclosed to Petitioner.

18. The government turned over the FBI interviews of Angotti shortly before trial. Angotti's grand jury testimony, threats against Angotti by the government agents and the agreement not to revoke Angotti's probation were never disclosed. At trial, Angotti testified

he had not been threatened by the government. Trial counsel was never provided a copy of Angotti's grant of immunity or advised that Angotti was on probation and had been threatened by the government with revocation if he failed to "cooperate" with the government. In an interview after trial, Angotti said he was granted immunity and that he had a "deal" with the government, and that was why he testified as he did.

19. On July 25, 2001, the District Court denied Petitioner's original motion on the merits and barred the Amended Claims in Petitioner's supplemental motion as untimely. Based on a certificate of appealability, Petitioner's appeal delineated all of the undisclosed exculpatory evidence that tended to show he was not guilty, that weakened the credibility of prosecution witnesses, and that demonstrated witnesses' bias, dishonestly, and motive to lie or exaggerate. Petitioner argued the materiality of this evidence. Petitioner argued that trial counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced Petitioner resulting in an unreliable or fundamentally unfair verdict.

20. Petitioner argued that the Amended Claims in his supplemental motion were made within one-year of the date on which the facts supporting them could have been discovered through the exercise of due diligence. Petitioner pointed out that all of this exculpatory evidence was still not available to him and it continues to be withheld by the government. Petitioner argued that this impediment (non-disclosure) had still not been removed and therefore the limitations period had not yet begun to run under 28 U.S.C. §2255(2). Petitioner argued in the alternative that the claims in his supplemental motion related back to the claims in his original motion and therefore his right to a hearing on the

merits should not be denied due to a procedural default. Petitioner also argued that his actual innocence should permit him a hearing on the merits.

21. While the appeal was pending, petitioner filed a Motion to Supplement the Record with exhibits showing that FBI Agent Daniel Craft had been caught falsifying reports in an unrelated case. The convictions in that case were vacated as a result of Craft's actions. Agent Craft was the agent that interviewed Earlywine and Dodds in this case. The court never ruled on the motion.

22. On May 16, 2003 the Court of Appeals issued its opinion and order. The Court of Appeals found "the supplemental motion is time-barred, unless Mandacina can satisfy a relation back analysis." (Appendix ("Pet. App.") A-31). The Court of Appeals disagreed with the District Court's conclusion that the amended Brady claim alleging the government failed to disclose the Borland Report did not relate back to the original Section 2255 motion. (Pet. App. A-33-34). However, the court rejected the argument that the government had a duty to disclose the list of names of the suspects Borland had identified as individuals with strong motives to murder the informant as well as all facts developed in the investigation of these suspects. The Court of Appeals observed that "evidence that a movant can discover through his own reasonable investigation is not illegally withheld by the government within the meaning of §2255(2), or under Brady," citing *United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998). (Pet. App. A-35). In finding that nothing prevented trial counsel from conducting an expedited investigation of the Borland Report and, if necessary, requesting the trial be continued to allow for more investigation, the Court of Appeals effectively transmuted Petitioner's Brady

claims into ineffective assistance claims. The Court then summarily denied the ineffective assistance claims on procedural grounds due to the failure of the Petitioner to more specifically delineate them in his original §2255 motion. The panel never conducted an inquiry as to whether the remaining Amended Brady Claims[4] related back, stating they were discoverable by reasonable investigation. These claims were of the same time and type as the related Borland report claim wherein the Court of Appeals overruled the District Court in finding the Borland report claim related back to the original motion's allegation that the government failed to disclose exculpatory evidence, "including various physical and other evidence obtained by the Gladstone Police Department and detectives involved in the investigation of Mr. Strada's murder" and the allegation that:

> The Government failed to properly disclose . . . any and all information related by Mr. Strada prior to his death in which Mr. Strada implicated any other person in any criminal activity, including any organized crime-related activity. Such information constitutes favorable and exculpatory information in that it establishes a motive for others besides Movant Mandacina to have killed or conspired to kill Mr. Strada.... There is a strong factual basis to support a defense theory... that Mr. Strada was killed not [**10] because of any statements he may have made regarding Movant Mandacina, but instead was killed by others who had a much stron

[4] Disclosure of the investigation reports leading to the creation of the list of other suspects; the follow-up to the investigation of Borland's drug information; the Steven St. John reports, the immunity and grand jury testimony of Steven St. John and documents evidencing Angotti's probation and "deal" with the government.

ger motive to retaliate against Mr. Strada.

These Amended Claims also satisfied Rule 15(c) as the government had notice of these claims as the party responsible for creating them.

23. In denying the amended ineffective assistance claims under the relation back analysis, the Court of Appeals apparently relied upon the government's version of Petitioner's original claim and not the original §2255 motion. The order and opinion stated: "The original claim alleged a failure by counsel to *discover* allegedly exculpatory footprint evidence; whereas, the amended claim alleged a failure by counsel to *investigate* the Borland Report." (Pet. App. 36).

The original motion stated: "...trial counsel provided ineffective assistance by failing to properly pursue discovery of potential testimony and physical evidence obtained by the Gladstone Police Department, *including but not limited to* any evidence obtained by the Gladstone Police Department regarding the footprints..." (emphasis added). In Petitioner's Petition for Rehearing he argued that his Amended Claims effectively alleged a failure by counsel to discover exculpatory evidence stemming from the Borland Report, i.e., "*the potential testimony...obtained by the Gladstone Police Department.*" Petitioner argued that the panel misapplied *United States v. Craycraft*, 167 F.3d 451 (8th Cir. 1999) in recharacterizing movant's claims from his original motion in finding that the amended ineffective assistance claims did not relate back. Furthermore, Petitioner submitted that any lack of specifics in the original motion resulted from the conduct of the government in concealing its own non-disclosures. Petitioner argued this was the impediment to timely claims if the claims did not relate back. Petitioner also argued that the government's action prevented the earlier discov

ery of these claims even with due diligence.

The Court of Appeals denied as untimely the Petitioner's amended Brady and ineffective assistance claims regarding disclosure of Angotti's immunity and deals because Petitioner did not raise them in his original habeas motion. The Court of Appeals did not analyze under §§ 2255(2) or (4) these Brady and ineffective assistance claims. Nor did the Court discuss the effect of the government's continued non-disclosure in relation to the timeliness issue. The Court of Appeals summarily rejected Petitioner's arguments that his remaining supplemental claims, including the St. John evidence, were timely filed under §2255(2) and (4) or that the claims related back to the original motion, despite the government's non-disclosure of all of this evidence.

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari because this case constitutes an erosion of this court's ruling in *Brady v. Maryland*; and the Court of Appeals failed to properly evaluate the shifting of the burdens contemplated by *United States v. Jones* under the correct constitutional standard, or misapprehended the controlling principles of the Due Process clause. This case represents a narrowing of the government's duty to disclose exculpatory evidence and raises substantial Due Process issues and represents a dangerous shifting of the burdens of proof.

Second, the Eighth Circuit decision conflicts with the reasoning of the cases of other circuits and of the Eighth Circuit itself. The opinion directly contradicts this Court's ruling in *Schlup v. Delo*, 513 U.S. 298 (1995).

Third, the issues presented herein constitute troublesome questions in the administration of justice, with

ongoing consequences. Discovery questions, and particularly Brady disclosures, are important to the administration of justice and are increasingly of such a recurring nature as to call for an exercise of this Court's supervisory power. This decision gives too much license to the government in it's non-disclosures of Brady type evidence.

I. The Court should grant certiorari because the government's concealment of exculpatory evidence renders Petitioner's conviction unconstitutional under the Due Process clause.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this court held that the Due Process clause requires the government to disclose evidence favorable to the accused if the evidence is material to either guilt or punishment. The requirement of disclosure of favorable evidence, whether it is exculpatory evidence or related to impeachment evidence, applies whether the defendant made a request or not. *United States v. Bagley*, 473 U.S. 667, 674-678, 682 (1985). Post trial, Petitioner has shown the existence of substantial exculpatory evidence that was not disclosed by the government. The Court of Appeals affirmed the District Court's application of *United States v. Jones*, 160 F.3d 473 (8th Cir. 1999), which held: "evidence that a movant can discover through his own reasonable investigation is not illegally withheld by the government within the meaning of §2255(2) or under Brady." Id at 479. The Court of Appeals did not distinguish discovering the existence of exculpatory evidence from discovering the actual reports, interviews, grand jury transcripts or other documents.

Presumably, the District Court found that it was not unreasonable for trial counsel to locate and interview Donna Borland in the three weeks prior to trial. The court assumed trial counsel had the ability to locate

this witness, had sufficient time available to conduct a comprehensive interview, and assumed a willingness on the part of this witness to speak to trial counsel despite her apparent recalcitrance in her interview with the Metro Squad. Then, the court necessarily concluded that upon learning the names of the Borland "suspects", trial counsel would make additional discovery demands for the reports prior and subsequent to the Borland interview, under *Brady v. Maryland*, and then convince the identified individuals – including the suspected actual killer - to speak with him. Presumably, these subsequent interviews would have revealed the withholding of the secret grand jury testimony, under immunity, of Steven St. John who contradicted one of the government's key witnesses.

In the real world, it is submitted this evidence was not reasonably discoverable by trial counsel. Trial counsel still would not have obtained the reports in the sole possession and control of the government. The government should not be allowed to rely on trial counsel's failures to shield it's own *Brady* violation from judicial redress. See *Murray v. Carrier*, 477 U.S. 478, 488 (1986), citing *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) (Sixth Amendment right to counsel means procedural default arising from ineffective assistance of trial counsel is imputed to sovereign rather than to accused citizen). It is unfair to disallow Petitioner's Amended Claims regarding wrongful government conduct on the premise that the government did not have adequate notice from the original pleading of the matters raised in the Amended Claims. The government made the decision to withhold the Brady evidence. This case presents the court with an opportunity to clarify or amplify the mechanism in place to rectify the situation wherein the government conceals it's own non-disclosures. Petitioner had no way to know what he didn't

know. This case also provides an opportunity to define what constitutes due diligence under 28 U.S.C. §2255(4) or a government impediment under 28 U.S.C. §2255(2).

Therefore Petitioner respectfully moves this Court to review to this critical area of criminal law.

II. The Court should grant certiorari because the opinion of the Court of Appeals conflicts with other circuits and with this Court's ruling in *Schlup v. Delo*, 513 U.S. 298 (1995).

In *United States v. Jones*, the court found that the undisclosed transcript of a witness' plea at sentencing hearing was readily available and therefore there was not a *Brady* violation if "the defendant(s) using reasonable diligence, could have obtained the information" themselves. *Jones* at 479. This case cited *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) cert denied, 519 U.S. 1094, 117 S.Ct. 773, 136 L.Ed 2d 717 (1997) and *United States v. Willis*, 997 F.2d 407, 412-13 (8th Cir. 1993); both cases involving readily available transcripts.[5] Here the reports pointing to other suspects, dealmaking with witnesses and grand jury testimony which directly contradicted a key government witness was known only to the government. Obtaining inter

[5] The District Court for the Northern District of Illinois has held that even readily available transcripts should not constitute an exception under the "reasonable investigation" rule if it was unreasonable to expect trial counsel to know they may contain exculpatory information. *United States v. Locke*, 1999 U.S. Dist.Lexis 11593 (ND.Ill. 1999). (Reversing due to the poor credibility of the government's witnesses and the overall weight of the evidence against the defendant, when trial counsel had no reason to suspect that statements in the transcript exculpated his client). Similarly, the Second Circuit rejected the government's argument that a failure to turn over an affidavit available in a public court file did not constitute suppression of evidence under Brady. *United States v. Payne*, 63 F.3d 1200, 1208-09 (2nd Cir. 1995).

views of suspects and other witnesses by law enforcement during a highly public investigation is difficult and this has been established by the inability to obtain them even years afterward.

The Fourth Circuit states the rule thusly: "the Brady rule does not apply if the evidence in question is available to the defendant from other sources." *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990). The Fifth Circuit takes it a step further stating "when evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek their discovery." *United States v. Dula & Accrabond Corporation*, 989 F.2d 772, 776 (5th Cir. 1993) citing *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985), cert denied, 474 U.S. 1086, 88 L.Ed 2d 900, 106 S.Ct. 861 (1986). The Third Circuit stated:

> where a court has ruled that impeachment material falls more under Brady instead of, or in addition to, the Jencks Act, and orders it disclosed, the defendant has received a guarantee of protection. When the government refuses to comply with that order, it's non-compliance may totally deprive the defendant of a fair trial, or even the grounds for appellate review, if the material does not emerge from the secret government files. Under such circumstances, the defendant has been denied protection of the court and is placed entirely at the mercy of the United States Attorney, or more realistically of the assistant assigned to the case. Only if the defendant is the beneficiary of fortuitous happenstance by discovering the materials through extra judicial means, as was the case here, are his rights vindicated.

United States v. Starusko, 729 F.2d 256, 265 (3rd Cir.

1984). In the present case, the Petitioner was fortunate to discover the existence of undisclosed Brady material. A remedy would be available to the Petitioner in most circuits. This evidence was not discoverable through the exercise of reasonable investigation, or due diligence, since it was in the sole knowledge, possession and control of the government. The list of suspect names, the evidence supporting the Metro Squad's identification of these suspects, the corroborating evidence that these suspects had been indicted for drug charges, the interviews and grand jury testimony of Steven St. John which contradicted a government witness, and the coercion of Angotti were not disclosed to trial counsel. This information was not reasonably available and, certainly, was not equally available. Rather, the government was forced by the trial court to belatedly reveal the Borland Report, which only hinted at the plethora of exculpatory evidence that was not disclosed.

The ruling of the Court of Appeals directly conflicts with the ruling in *Edmond v. United States Attorney*, 959 F.Supp. 1 (D.D.C. 1997) wherein the court ruled:

> ...in accordance with the AEDPA (Anti-Terrorism Effective Death Penalty Act) the one-year period of limitation would not run until 'the date on which the impediment to making a motion created by governmental action and violation of the constitutional laws of the United States is removed.' 28 U.S.C. §2255(2). Therefore, if plaintiff is claiming that the government is holding exculpatory material (Footnote to *Brady v. Maryland*), the one-year limitation would not begin until the plaintiff receives that evidence.

Until the actual documents are all received, the Petitioner is not able to fully state any additional claims he

may have. The government's suppression was what prevented post-trial counsel from being more specific in the original motion. This court should find that 28 U.S.C. §2255(2) (following the logic in *Edmond*) prevents a procedural default due to the government's action. The government should be encouraged to favor disclosure of Brady evidence.[6]

The Eighth Circuit contradicted this Court's holdings when it found Petitioner did not meet the actual innocence standard. In order to conduct an actual innocence analysis, the District Court must review the withheld evidence: "...the focus on actual innocence means that a District Court is not bound by the admissibility rules that would govern at trial, but may consider the probative force of relevant evidence that was either wrongfully excluded or unavailable at trial." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The Court of Appeals held the District Court found a failure to meet the actual innocence standard despite the fact that no hearing has ever been held and the District Court still had not benefited from a review of the undisclosed evidence to consider it's probative force. Furthermore, the District Court did not consider the statements of Charles St. John, which is the most clear and convincing evidence of Petitioner's innocence. Charles St. John admitted to having the ability, motive and opportunity to commit the crime, admitted to observing Strada set his weapon down on the trash bag seconds before the murder, and he admitted to committing the murder, in

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[6] Neither the prosecution nor the Court is aware of the defense strategy and therefore neither the prosecution nor the Court can accurately determine what may be important. *United States v. Sudikoff*, 36 F.Supp.2d 1196, 1202 (C.D. Cal. 1999). "where doubt exists as to the usefulness of evidence, (the government) shall resolve such doubts in favor of full disclosure. *United States v. Van Brandy*, 726 F.2d 548, 552 (9th Cir. 1984).

the presence of Kevin Cummings. An evidentiary hearing would establish that this evidence is consistent with the autopsy and other physical evidence and with Petitioner's theory that Strada was shot with his own weapon by someone he trusted. The suppressed evidence includes evidence that Borland believed that the St. Johns committed the murder, that Charles St. John believed that Strada had snitched on him, that Charles St. John knew Strada's routine, that St. John was facing a long prison term if Strada testified, and that Charles St. John's probation was eventually revoked because the government alleged he was stalking another "snitch" with a shotgun. No one knows what additional exculpatory evidence supporting actual innocence could be found in the undisclosed reports. If all of this evidence were properly reviewed, investigated, prepared, presented, and considered cumulatively by the District Court, as required by an actual innocence review, the court would not have confidence in the outcome unless the Court is also satisfied that the trial was free of non-harmless constitutional error. *Id* at 316. This is especially true in light of the fact that Petitioner's conviction relied entirely on the weak credibility of three witnesses looking to save their own skins.

Therefore, Petitioner respectfully prays that this Court grant certiorari to decide important questions of federal statutory and constitutional law and to resolve conflicts between the Courts of Appeal, and Petitioner's meritorious constitutional claims should pass through the actual innocence gateway to avoid a procedural default.

III. The Court should grant the petition in order to exercise its supervisory powers to correct an improper ruling by the lower court.

The prosecutor determined what was exculpatory

and what would be disclosed. The Metro Squad investigation reports, the secret reports, interviews and immunized grand jury testimony of Steven St. John and the deal with Angotti were in the exclusive control of the government. To hold they were reasonably available to counsel, who did not even know of their existence, and to convert the non-disclosure claims into ineffectiveness claims is unfair. This Court should employ its supervisory powers to correct a ruling that is unjust and unreasonable.

In determining whether the non-disclosed information was exculpatory, a court should consider whether the prosecution's failure to disclose the evidence misled the defense and thus adversely affected "the preparation or presentation of the defendant's case." *United States v. Bagley*, 473 U.S. 667, 682-683 (1985); *United States v. McKellar*, 798 F.2d 151, 153 (5th Cir. 1986). It should consider the totality of the circumstances of this case, with an awareness of the difficulty of determining what the defense would have done if the defense had not been misled by the government's failure to disclose the evidence. *Bagley*, 473 U.S. at 683; *Giglio v. United States*, 405 U.S. 150, 154-155 (1972); *East v. Johnson*, 123 F.3d 235 (5th Cir. 1997) (conviction reversed where prosecution suppressed evidence that would have led defense to discover report raising questions about state witness' reliability). The search for "materiality" requires a court to evaluate not only the potential power of the undisclosed evidence and its progeny, but also the relevant strength of prosecution's case. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). C.F. *United States v. Robinson*, 39 F.3d 1115, 1119 (10th Cir. 1994) ("what might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict"). In this case, there was no physical evidence that linked Petitioner to the crime. Petitioner made no

incriminating statements or admissions and has always maintained his innocence. The government's case was based solely on the testimony of three witnesses who obtained immunity deals and had extensive criminal records. Had the government made the Brady disclosures, the defense could have presented the theory, corroborated by the physical evidence, that Charles and Steven St. John killed the informant for snitching on them and to prevent him from testifying against them in their pending drug case. This theory alone creates a reasonable probability that the result of the trial would have been different. Had the government disclosed the pressure it put on Frank Angotti and the contradictory evidence obtained under a grant of immunity from Steven St. John, there would again have been a reasonable probability that the result of the trial would have been different. Taken in it's entirety, the suppressed evidence and the evidence that could have been developed from it, created a substantial probability that the result would be different. The case that supported the conviction was weak. The government mislead the defense and the Court as to what evidence existed, causing trial counsel to abandon key lines of independent investigation, defenses and trial strategies that he otherwise would have pursued. Under *United States v. Bagley*, such factors should be weighed by the court examining the level of confidence in the outcome of trials over which they rely:

> The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense in the trial would have taken had the defense not been mislead by the prosecutor's incomplete response.

Bagley, 473 U.S. 683. While post trial counsel has determined that the exculpatory material exists, its continued non-disclosure trumps any argument that this evidence could have been discovered by reasonable investigation.

CONCLUSION

The resolution of the questions presented herein will have immediate importance far beyond the particular facts and parties involved in this case. Fundamental fairness demands government's compliance with Brady and its progeny. The prosecution can now conceal exculpatory evidence leading directly to other individuals with a greater motive, opportunity and ability to commit the crime for which a defendant is on trial, if it gives trial counsel a lead which may – or may not – permit him to discover this evidence, even if the lead is only given three weeks prior to trial. The dilemma this creates is only compounded if the Brady claims are converted to ineffective assistance of counsel claims with a resultant finding that trial counsel should have discovered that material through reasonable investigation. This shifts the focus from the government's wrongful conduct to trial counsel's competency and permits an end-run around of *Brady v. Maryland*. Of course, a declination to review, will reward the government's concealment of its non-disclosures. John Mandacina is innocent and was denied his constitutional right to a fair trial.

THEREFORE, for the tremendously important principles and compelling reasons contained herein, Petitioner prays this Court grant his petition for certiorari and permit him an opportunity to present his meritorious claims and/or grant Petitioner an evidentiary hearing after full disclosure to present his proof of actual innocence so his constitutional claims can avoid a procedural default.

APPENDIX ITEM A-1

John A. Mandacina v. United States, 2001 U.S. Dist. Lexis 20971 (W.D.Mo. 2001)

Order of the United States District Court for the Western District of Missouri

July 25, 2001

(denying Motion to Vacate)

APPENDIX A

JOHN A. MANDACINA,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 97-0572-CV-W-6,
Crim. No. 93-00073-01-CR-W-6

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

2001 U.S. Dist. LEXIS 10971

July 25, 2001,

Decided

July 25, 2001, Filed

SUBSEQUENT HISTORY: Subsequent appeal at *Mandacina v. United States, 18 Fed. Appx. 450, 2001 U.S. App. LEXIS 20285 (2001)*

Affirmed by Mandacina v. United States, 2003 U.S. App. LEXIS 9460 (8th Cir. Mo., May 16, 2003)

DISPOSITION: [*1] **Movant's** motion (Docs. 12, 15) to set aside or reconsider the court's memorandum and order and/or permit the filing of a supplemental motion under *28 U.S.C. § 2255* DENIED. Movant's Supplemental Motion" (Docs. 10, 14) to vacate and/or set aside conviction and sentence pursuant to *28 U.S.C. § 2255* STRICKENED. Movant's claims relating to the footprint evidence discovered by the Gladstone Police Department DENIED.

COUNSEL: For JOHN A MANDACINA, movant (97-CV-572): David B.B. Helfrey, Helfrey, Simon & Jones, St. Louis, MO.

For USA, respondent (97-CV-572): Paul S. Becker, U.S. Attorneys Office, Kansas City, MO.

U. S. Attorneys (93-CR-73-1): Paul S. Becker, U.S. Attorneys Office, Kansas City, MO.

JUDGES: HOWARD F. SACHS, UNITED STATES DISTRICT JUDGE.

OPINION BY: HOWARD F. SACHS

OPINION:

MEMORANDUM AND ORDER

On September 27, 2000, movant John A. Mandacina sought leave to file a "Supplemental Motion to Vacate and/or Set Aside Conviction and Sentence Pursuant to 28 U.S.C. § 2255." Movant sought to file his amended motion twenty days after the court entered an order denying all but two grounds presented in the original § 2255 motion -- and more than three years after the original motion became fully briefed. The court asked the parties to provide further briefing addressing the timeliness of the amended claims. It also requested further briefing of the original claims relating to the footprint evidence discussed [*2] in the Memorandum and Order of September 7, 2000. The requested briefing is now on file, and the pending motions are ready for ruling.

I

The court will adhere to its initial impression that the "footprint" claims are without merit. It refers the parties to its previous observations surrounding the deci

sion to order the Government to make the footprint evidence accessible to movant and his counsel:

> The discretionary decision to allow reopening of an issue in an old case is, I acknowledge, a close call. It seems doubtful that the presence of an unidentified person around the time of the killing would be significantly exculpatory, given the "strong evidence" of movant's guilt. *United States v. McGuire,* 45 F.3d 1177, 1190 (8th Cir. 1995). It is notable that McGuire's guilt is no longer in question. In the interest of justice, however, and possibly tending to implicate a third person in the killing, discovery will be authorized.

Order of Sept. 7, 2000, at 4 n.2.

The Brady claim fails for a simple reason: there is no genuine contention that the footprint evidence was not available to movant prior to trial. His trial counsel's affidavit states [*3] that counsel concluded that, "after discussions with experts at the Crime Lab, no pertinent or significant information regarding footprints would tend to prove the innocence of the defendant." Moreover, counsel was notified by a letter dated July 6, 1993, that the crime scene photographs were available at the United States Attorney's office for review and inspection; these photographs included photographs of the footprint impressions left at the crime scene. See "Government's Response" (Doc. 25), Ex. A-D. Whether or not the evidence is "material" under Brady, the Government disclosed it in the first instance.

Nor does the footprint evidence support a meritorious claim that movant was denied effective counsel. Movant must demonstrate that counsel's performance was objectively deficient, meaning that it fell "outside the wide range of professionally competent assistance."

Strickland v. Washington, 466 U.S. 668, 690, 80 L Ed. 2d 674, 104 5. Ct. 2052 (1984). Courts strongly presume that counsel's conduct falls within the wide range of reasonably professional assistance, and that the challenged decision might be considered sound trial strategy under the circumstances [*4] presented to counsel at the time. *Id.* at 689; *Fretwell v. Norris,* 133 F.3d 621, 624 (8th Cir. 1998).

Movant has not overcome these presumptions. The court rejects movant's argument that the Government's failure to turn over any analysis of the shoe sizes demonstrates that trial counsel cannot have relied upon the Government's analysis of the shoe sizes. Movant is putting words into trial counsel's mouth, for the affidavit states only that counsel *spoke* with experts at the crime lab. Movant also relies heavily upon analyses later discovered by postconviction counsel, suggesting that the prints were made by an individual with a different shoe size than McGuire's. Yet, the Strickland claim must rest upon information that was either known to trial counsel at the time or that *any* reasonable attorney would have investigated and discovered. Given the demands placed upon trial counsel facing a murder trial, it cannot be expected that counsel will doggedly investigate every conceivable suggestion that maybe someone else was (also?) involved. n1 Nor do I believe that counsel may never reasonably rely upon the Government's analysis of evidence; indeed, [*5] doing so might free counsel to investigate other leads that he finds more promising:

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

> professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. In short, movant has not shown why counsel's particular investigation of the footprint evidence was not professionally reasonable at the time. Eight years later, the possible significance of the evidence remains highly speculative.

> n1 The Government never asserted the print-marks were McGuire's, thus tacitly acknowledging that at some uncertain time another person was there. Neither defense counsel saw much prospect for using this to prove McGuire's absence from the murder scene.

[*6]

Furthermore, movant must show that he was prejudiced by counsel's alleged error (or by the Government's non-disclosure). "Prejudice" requires a reasonable probability that, but for counsel's errors, the proceeding would have had a different result. *Id.* at 694. A reasonable probability is one sufficient to undermine one's confidence in the outcome. *Id.* At best, movant has demonstrated that McGuire wears a size 9 1/2 shoe, that the footprint in question was made by an individual with a shoe size between 7 and 8 1/2, and that Steven St. John's shoe size is 7 1/2. Putting aside the implausible suggestion that a more thorough footprint investigation would have unearthed movant's recently

formulated theory that St. John was the murderer, the evidence shows only that some unidentified person other than McGuire may have been on Larry Strada's property around the time of the murder. While not disputing that the evidence is conceivably relevant, I cannot conclude that its absence makes the verdict fundamentally unreliable, or that a different verdict would have resulted from its presentation to a jury. Contrary to movant's argument, it bears repeating that "(t)here was [*7] strong evidence that Mandacina was guilty of the crime of which he was convicted. *McGuire,* 45 F.3d at 1190. The jury was already aware that Strada had many enemies, and the footprint evidence does not directly undermine the "strong evidentiary link between the murder and the criminal activities of movant and McGuire -- a link described in some detail by the Court of Appeals. *Id.* at 1180-82.

II

The court next concludes that plaintiffs amended claims are untimely unless they relate back to those originally asserted. Amended claims are permissible only if the amendments themselves satisfy the one year statute of limitations under 28 U.S.C. § 2255. *United States v. Craycraft,* 167 F.3d 451, 456-57 (8th Cir. 1999). The limitation period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted [*8] was initially recognized by the Supreme Court, if the

> right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Movant's conviction became final before AEDPA's effective date, so the motion was presumptively due on April 24, 1997, the day after it was filed. *Moore v. United States,* 173 F.3d 1131, 1135 (8th Cir. 1999). The proposed amendments were tendered on September 27, 2000, long after the presumptive deadline.

Movant resorts to subsections (2) and (4) above, but neither argument is availing. As a general matter, the court agrees with the Government that movant has failed to specify in detail (a) the items of evidence supporting the amended claims but omitted from the original claims, (b) the circumstances supporting a contention that each particular item either could not have been timely presented through the exercise of due diligence, or that it was being illegally suppressed, (c) the date at which each item was discovered, and (d) the date at which each [*9] item could have been discovered, either through the exercise of due diligence or the removal of governmental interference. Without a more particularized showing by movant, the court cannot even determine the date from which a later one year period might begin to run under 28 U.S.C. § § 2255 (2) and (4), much less conclude that the amended claims were tendered within that period. The burden of proof rests upon movant, and the court has no duty to scour the record on his behalf.

A few of movant's arguments are more focused, but these are readily rejected. Movant states that his

amended claims came to light only after a private investigator discovered the necessary facts, that movant's family lacked the financial resources to pay for a thorough investigation until well after the initial § 2255 motion was filed, and that an earlier presentation of the amended claims was prevented by movant's indigence rather than a lack of due diligence. I do not doubt that many prisoners are indigent, and that indigent prisoners cannot easily investigate habeas claims, but I am unaware of any authority allowing poverty to serve as a basis for extending the limitation period under [*10] § 2255(4) or otherwise. *United States v. Richardson,* 2000 U.S. App. LEXIS 11727, *5, 2000 WL 676009, at **I (10th Cir. May 24, 2000) (declining to equitably toll the statute, and observing that "[movant]'s poverty, sadly, is unexceptional.'). To the contrary, a movant is expected to conduct a reasonably thorough and diligent investigation before filing a first motion under § 2255. *In re Boshears,* 110 F.3d 1538, 1540 (11th Cir. 1997). n2 In effect, § 2255(4) "establishes the principle that a petitioner must conduct a reasonable and diligent investigation aimed at assembling all relevant claims and grounds for relief within a year of entry of final judgment on his conviction," or, in this case, within a year of the statute's effective date. *Rodriguez v. United States,* 1999 U.S. Dist. LEXIS 20575, 1999 WL 1487600, at *3 (E.D. N.Y. Dec. 23, 1999). Doubtless Congress understood that most prisoners have limited resources, but for better or worse it valued the finality of convictions despite the hardship created by the time limit. In short, section 2255(4) provides no refuge for the prisoner who first asserts timely claims, only to later assert untimely ones after conducting a more thorough investigation. [*11]

n2 A consequence of this expectation is that discovery is more limited in postconviction proceedings

than in other civil cases. A movant may not rest upon notice pleading to describe generalized claims, then hope to ascertain the specifics during discovery. Rather, discovery is proper only when the movant's "specific allegations . . . show reason to believe" that the movant may be entitled to relief if the facts are more fully developed. Advisory Committee Notes to Rule 6 Governing § 2254 Cases (incorporated into notes to Rule 6 Governing § 2255 proceedings); *Smith v. United States,* 618 F.2d 507, 509 (8th Cir. 1980) (discovery properly denied when movant merely listed the records he sought and did not state what he hoped to find therein or how they would support his § 2255 motion). Movant now protests that the original motion's broad plea for discovery of "various investigative materials and physical evidence ...in the possession of the... Gladstone police" was never acted upon, but no discovery was proper other than what the court authorized regarding the footprint evidence, which was itself a "close call." For that matter, during the three years that passed after movant's motion became fully briefed, movant never suggested to the court that it should delay a ruling in the interest of discovery, or that an amended motion was being contemplated. The attempt to resurrect a theoretical right to formal discovery, never pressed during the unduly long period before the September ruling, suggests instead that the current motion is doubly untimely. In ordinary civil litigation it would be almost unthinkable to reopen a summary judgment ruling for specific new contentions after an adverse decision.

[*12]

Movant relies heavily upon a report by the Gladstone

Police Department describing an interview of one Donna Borland, taken while the police were investigating the Strada murder. Ms. Borland, who previously maintained a romantic relationship with Mr. Strada, said that she "felt" he had been murdered for providing names and information to the Government relating to his drug activities, that some of the individuals described by Mr. Strada had been indicted within the several months preceding the murder, that almost all of them worked at or frequented Strada's Deli, and that the killing occurred because of drug indictments rather than gambling indictments. Movant's Reply, Ex. A. The "Borland Report" does not list particular names those suspected by Ms. Borland, but the interviewing officer mentioned various names that Ms. Borland confirmed as individuals she suspected even though she was "very hesitant" to give specifics. Movant's investigator interviewed Ms. Borland last summer, and it was confirmed that the names listed on the drug indictments for Steven St. John and others were the same names that she had earlier identified as suspects when speaking with the Gladstone police officer. [*13] Movant argues that present counsel did not receive a copy of the report until July 2000, after the investigator located it in the original court file, and that the report bore further investigative fruits -- including the investigator's interview with Ms. Borland and other evidence consistent with the hunch that Steven St. John or another was the perpetrator.

Although probative of movant's guilt or innocence, the Borland Report does not provide a basis for extending the statute of limitation. First, far from creating an illegal impediment that kept movant from making an otherwise timely claim based upon the report, see 28 U.S.C. § 2255(2), the Government disclosed the report to counsel prior to the trial. Even though the particular

names discussed by Ms. Borland were not disclosed, these could have been discovered through a reasonably diligent investigation -- just as the current investigator discovered them by speaking with Ms. Borland himself, and just as present counsel developed an elaborate theory implicating Steven St. John in the few months following his discovery of the Borland Report. Evidence that a movant can discover through his own reasonable [*14] investigation is not illegally withheld by the Government within the meaning of § 2255(2), or under *Brady. United States v. Jones,* 160 F.3d 473, 479 (8th Cir. 1998). n3 For that matter, movant's investigator found the report by looking at the original case file, which is hardly a heroic investigative measure. Presumably movant could have searched the file in a more timely fashion, but he chose to rely on the "copy file" that trial counsel gave to postconviction counsel, which apparently omitted the report. Whatever the wisdom of movant's decision, it cannot be attributed to governmental obfuscation.

> n3 Even if it were timely, then, a Brady claim based upon the Borland Report and its fruits would be without merit. Movant notes that the Government disclosed the report only about four weeks before trial, but nothing prevented movant from seeking a continuance or conducting an expedited investigation. Movant now asserts that counsel rendered ineffective assistance by failing to investigate the report. That claim is untimely under § 2255 unless it relates back to the original motion.

[*15]

Nor can it be shown that the Borland Report was only recently discoverable through a diligent investigation under 28 U.S.C. § 2255(4). Counsel knew about the report before the trial and obtained the information in

the course of representing movant. Thus, counsel's knowledge is attributable to movant under agency principles. *Woods Farmers Cooperative Elevator Co. v. Z-Mega Farms Limited Partnership I,* 95 F.3d 693, 699 (8th Cir. 1996) (discussing "the general rule of agency that the principal is chargeable with the knowledge of its agents"). Furthermore, movant could have searched through the original case file in a timely fashion, discovered the report, and developed the same evidence now recounted in the amended motion. Under these circumstances, movant has not demonstrated why previous attorneys could not have discovered these documents prior to his original habeas filing by exercising the same due diligence his current attorneys employed." *In re Magwood,* 113 F.3d 1544, 1549 (11th Cir. 1997) (addressing similar provision in 28 U.S.C. § 2244(b)(2)(B)(i)).

Movant also implies, somewhat cryptically, [*16] that the Government's failure to disclose statements and testimony from Brock Decastrogiovannimausolf prevented movant from discovering various fruits and derivative fruits of Brock's testimony. Movant's Reply to Court's Memorandum, at 16-20. The Brock evidence underlies a Brady claim in the original § 2255 motion, as well as a claim of newly discovered evidence. Yet, there is no explanation why the fruits described by movant, and presented in the amended motion, could not have been discovered and presented in the original motion filed some years after the events in question, based upon Brock's known statements and testimony.

Movant next contends that the statute should be equitably tolled even if § § 2255(2) and (4) do not apply. This argument, too, is unavailing. Equitable tolling is appropriate only when extraordinary circumstances beyond a prisoner's control make it impossible to file a

petition on time." *Kreutzer v. Bowersox,* 231 F.3d 460, 463 (8th Cir. 2000). The court has already explained why movant could have asserted the amended claims in a timely fashion if he had conducted a timely investigation. Accordingly, a timely filing of the amended claims [*17] was not impeded by circumstances beyond movant's control. Nor is equitable tolling justified by virtue of movant's limited resources. *Richardson,* 2000 WL 676009, at **1.

Finally, movant argues that his claims satisfy the "actual innocence" standard, so as to justify their tardy assertion. I will assume, without deciding, that the "actual innocence" gateway may excuse an untimely claim as opposed to an abusive or successive one, and that the standard is whether movant has established "that it is more likely than not that no reasonable juror would have convicted him" if presented with the evidence at trial along with that underlying the newly asserted claims. *Schlup v. Delo,* 513 U.S. 298, 327, 130 L Ed. 2d 808, 115 S. Ct. 851 (1995); but see 28 U.S.C. § 2255 (requiring "clear and convincing" showing of innocence in order to file a successive motion); 28 U.S.C. § 2254(e)(2)(B) (same showing required under § 2254 if petitioner fails to develop facts in state court).

Even if the Schlup standard applies, movant has not satisfied it. The amended claims, at bottom, all contend that individuals other [*18] than movant had greater reason to murder Mr. Strada than movant did, or greater ability to finance a $ 25,000 hit. The court has already explained its skepticism toward this sort of evidence:

> The fact that the Government may have known of other individuals who had a motive to murder Mr. Strada and were suspected in the murder does not undermine the court's confidence in the proceed

> ings. The jury in this case heard evidence that Mr. Strada informed the Government about the criminal gambling activities of a group of approximately ten people. Even without the introduction of the undisclosed evidence, it would have been clear to the jury that Mr. Strada had made enemies of a number of potentially dangerous individuals in addition to movant.

Memorandum and Order of September 7, 2000, at 5. n4 Much of the newly introduced evidence is arguably exculpatory and hypothetically admissible at trial, but it is not so convincing that all reasonable jurors would vote to acquit. The court will address the evidence in the approximate order of its presentation.

> n4 The showing required of movant is more demanding than the "prejudice" standard underlying the Brady and Strickland claims at issue in the court's previous order. *Schlup,* 513 U.S. at 327 & n.45.

[*19]

--The Borland Report, or at least its admissible fruits, suggests that certain figures involved in drug-related crimes may also have had reasons to kill Mr. Strada. It does not suggest that movant had no reason to do so. It would not compel a reasonable jury to reject the evidence upon which movant was convicted, most notably the testimony of Terry Dodds and Tom Earlywine.

--There is evidence that Mr. Strada may have provided information about the drug activities of Steven and Charles St. John, but movant provides no distinct proof that Mr. Strada did provide such information. n5 Even if he had, Steven and Charles St. John would serve as little more than two additional names on a lengthy list of possible enemy/suspects, and movant

tellingly declines to rest his claims on any single one of them. In addition to those previously known, movant now attempts to implicate Steven St. John, Charles St. John, Nick LaBruzzo, Jack Lascuola, Pete Simone, and Buddy Mandacina. Whether the evidence relates to Mr. Strada's drug activities or gambling activities, the court remains convinced that the jury already knew that Mr. Strada "had made enemies of a number of potentially dangerous individuals [*20] in addition to movant." Movant, too, had reason to be Mr. Strada's enemy. Of all enemies or potential enemies, *movant* was identified as offering $ 25,000 for the hit.

> n5 See Amended Motion, at 5: "Strada was *likely* giving information and/or was a witness against Steven and Charles St. John."

--Steven St. John's presence with Mr. Strada on the night before the murder is not convincing evidence that he committed the crime.

--The ballistics evidence arguably suggests that Mr. Strada was shot at close range, but that has minimal value in showing that he was shot by an acquaintance. For that matter, movant provides no evidence that Mr. McGuire and the decedent were strangers.

--The newly presented evidence regarding Frank Angotti does not assist movant, since Mr. Angotti's testimony was admitted only against Mr. McGuire, as dramatically emphasized at trial. In any event, the chain of events that may have prompted Mr. Angotti to ask Mr. McGuire about the murder bears only marginal relevance to the substance [*21] of the inquiry -- and its incriminating response. n6 Nor would a jury probably reject Mr. Angotti's testimony if informed of the purported immunity deal described by movant. Indeed, the jury credited Dodds' and Earlywine's testimony despite

their deals with the Government.

n6 Mr. Angotti's purported 'recantation" is equivocal at best.

--Movant does not specify the details of allegedly undisclosed aspects of Mr. Strada's cooperation with the Government. n7 Therefore, there is no merit to the suggestion that such disclosure would provide a basis for a more effective cross-examination of Mr. Earlywine. Even crediting movant's speculation concerning what Mr. Strada was questioned about, and the further speculation that the questioning would have (a) bolstered Mr. Earlywine's previous statement that others besides movant were involved in making the offer to kill Mr. Strada, (b) undermined his statement at trial that only movant made the offer, and (c) undermined his trial testimony that he incorrectly signed a [*22] written statement -- erroneously transcribed by an FBI agent --to the effect that Mr. LaBruzzo was present at Chubby's Restaurant along with movant and three others, movant would still be implicated in plotting Mr. Strada's murder whether or not others were also present or involved.

n7 See Amended Motion at 17: 'It is incomprehensible to believe that Larry Strada was not questioned about Jack Lascuola's gambling operation and/or other crimes in which Lascuola or his subordinate Nick LaBruzzo may have been involved. It is even more incomprehensible to believe that the Government did not ask Larry Strada questions about Pete Simone."

--The temporal proximity between the murder and a meeting of Mr. McGuire, Mr. Simone and other "organized crime figures" does not persuasively suggest that the meeting was convened to arrange Mr. Strada's

murder. Neither does it disprove Earlywine and Dodds' account of a conversation in which movant asked Mr. McGuire to kill Mr. Strada, nor Mr. Earlywine's testimony that movant [*23] said that he wanted Mr. Strada to be murdered and that he would pay Mr. McGuire $ 25,000 to do it. The evidence at trial, then, described the specific conversations that took place, while the newly presented evidence does not. n8 The same must be said of various gatherings at Anthony's, Jennie's, and the Red Front Restaurant, in the absence of competent evidence describing what transpired. Finally, Brock's observation of the meetings described above does not lend new-found weight to her grand jury testimony that Dennis Crouch brought the duffel bag of guns into the Red Front.

> n8 For that matter, the evidence described tends to show that McGuire shot Strada, contrary to movant's theory that Steven St. John or some other individual was the killer.

--The meetings do not disprove the proposition that McGuire traveled to Kansas City to commit the murder. Movant argues that McGuire was induced to commit the murder during a meeting that preceded it, but, again, there is no convincing evidence showing what transpired [*24] at the meeting. The meeting does not sufficiently disprove Dodds and Earlywine's testimony that movant had earlier agreed to pay McGuire $ 25,000 to murder Mr. Strada, nor defeat the reasonable inference that McGuire traveled to Kansas City to carry out the hit. *McGuire,* 45 F.3d at 1186-87.

In sum, the various theories now presented are at most suggestive of a multi-faceted conspiracy, but have little tendency to exonerate movant as a key figure.

III

Another question is whether the amended claims relate back to the original ones. An amendment relates back to the original pleading only if it arises out of the same "conduct, transaction or occurrence." *United States v. Craycraft,* 167 F.3d 451, 457 (8th Cir. 1999), citing Fed. R. Civ. P. 15(c)(2). Craycraft held that an attorney's failure to perfect an appeal was a "separate occurrence in both time and type" from the originally pleaded failure to pursue a downward departure or to object to the type of drugs at issue. Id. The original Craycraft petition did not provide adequate notice of the amended claim, even though both claims involved counsel's inadequacy. *Id.*

Movant makes [*25] several attempts to relate the amendments back to the original claims. The first of these rests upon the original motion's contention that "the government failed to disclose to movant and his trial counsel certain evidence favorable to Movant as required by the applicable rules of criminal procedure and federal case law, including, *Brady v. Maryland.*" Boilerplate generalizations of this sort, however, do not provide adequate notice of particular withholdings of evidence not specifically referred to in the original motion. It is insufficient that the amended claims and the original ones are both Brady claims, just as it was insufficient in Craycraft that both sets of claims alleged ineffective assistance of counsel.

Additionally, movant ignores the "heightened pleading requirements" governing habeas practice. *McFarland v. Scott*, 512 U.S. 849, 856, 129 L. Ed. 2d 666, 114 S. Ct. 2568 (1994). While other civil litigants are permitted to rest upon "notice pleading," a petitioner must "set forth in summary form the facts supporting each of the grounds asserted. Rule 2(b) Govern

ing § 2255 Proceedings. As explained above, the law presupposes that a movant has [*26] performed a thorough investigation prior to filing, and discovery is authorized only to flesh out particularized allegations. *Munoz v. Keane*, 777 F. Supp. 282, 287 (S.D.N. Y. 1991) (generalized statement of Brady violation did not justify discovery, where defendants did not produce any specific evidence to support claims); *Smith v. United States,* 618 F.2d 507, 509 (8th Cir. 1980). n9 Notice pleading, by contrast, requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," and the plaintiff may develop the facts through discovery and amendments as long as the claim is brought in good faith. Fed. R. Civ. P. 8(a). The "notice" required of a § 2255 motion, then, effectively differs from that required of a civil complaint. A blanket statement that the Government withheld exculpatory evidence, or that counsel performed ineffectively, is not a "claim" at all if it does not describe the evidence withheld or the ineffective assistance rendered. Since a general statement is not a "claim," it does not provide a basis for relating amended claims to the original pleading.

> n9 The relevant rules governing § 2254 and § 2255 proceedings do not materially differ. Both sets of rules permit the court to allow discovery upon a showing of "good cause," and both require the pleader to "set forth in summary form the facts supporting each of the grounds" asserted.

[*27]

Movant next asserts that both pleadings allege the same types of Brady claims, specifically, that the Government withheld evidence tending to show that other individuals may have been involved in the crime, as well as evidence that could have impeached the

Government's witnesses. Nevertheless, all of the claims involve distinct withholdings of evidence, and only certain withholdings are described in the original motion. For example, the withholding of Brock's statements is distinct from the alleged withholding of the Borland Report. The various items share some of the same evidentiary purposes, but the withholdings themselves are distinct acts. In the context of habeas pleading, I cannot say that the original motion gives fair notice of Brady claims not specifically asserted -- and which were actually unknown to movant.

Movant also describes various evidentiary items discovered as a result of Brock's statements. But there is little explanation why any amended claim relates back to the original claims concerning Brock's statements. Even if the other items were derived from Brock's statements, the amended claims stem from separate withholdings of which the Brock claims give [*28] no notice.

Movant next contends that the arguments on pages 20-30 of the amended motion relate back to a statement in the original motion that:

> Movant respectfully submits that his trial counsel failed to properly investigate and discover evidence, and/or failed to call various witnesses who would have been able to provide testimony in support of movant, and/or failed to fully and thoroughly cross-examine certain witnesses on certain issues which would have been favorable to movant's defense.

Again, the language speaks only of generalized types of failings in counsel's representation. It does not provide distinct 'claims' as to which the amended claims might relate back. Similarly, it does not provide fair

notice of the particular contentions subsequently developed by counsel and movant's investigator, such as the "close relationship" between Mr. McGuire and Buddy Mandacina.

Movant's strongest pleading argument concerns the Borland Report. n10 The original motion states that the Government failed to disclose certain exculpatory evidence, "including various physical and other evidence obtained by the Gladstone Police Department and detectives involved in the investigation [*29] of Mr. Strada's murder. It further alleges that counsel failed to pursue adequate discovery of "potential testimony and physical evidence obtained by the Gladstone Police Department, including but not limited to [the footprint evidence]." The Borland Report, in turn, was obtained by the Gladstone police, and it contained information suggesting that individuals other than movant may have committed the murder. Despite the facial similarity between the original and amended claims as to the "time and type" of violations at issue, *Craycraft*, 167 F.3d at 457, I do not believe that the claims concerning the Borland Report and its fruits relate back to the original motion. A generalized assertion that materials obtained by the Gladstone police were withheld by the Government or inadequately investigated by counsel does not state a viable claim absent some specification of the materials in question and their exculpatory value. The original motion makes no mention of the Borland Report and gives no notice of its alleged omission or counsel's failure to investigate it. That is quite likely because postconviction counsel was unaware of the report when drafting the motion, owing [*30] to the failure to conduct a timely investigation. Any similarity between the amended claims and the original ones in this regard is only coincidental, n11

n10 Certain arguments concerning the Borland Report will be summarily rejected based on the preceding paragraphs. These include (a) movant's attempt to tie the Borland Report to a statement in the original motion that the Government failed to disclose all information in which Mr. Strada implicated other persons in criminal activity, as well as the telephone call to John Frankum, and (b) movant's attempts to relate the investigative fruits of the Borland Report to the original motion.

n11 The "relation back" issue concerning the Borland Report does present a reasonably close question, and the court could likely be persuaded to grant a Certificate of Appealability--if persuaded that the report could reasonably cause a grant of habeas.

IV

Movant's reply to the court's order of last January seeks to assert still more amended claims. These include a [*31] claim that the Government withheld evidence regarding the series of events that may have prompted Mr. Angotti to ask Mr. McGuire about the killing, as well as a claim that appellate counsel performed ineffectively by failing to argue that the suppression of certain statements and testimony of Brock prejudiced trial counsel's ability to contest the government's case. The request to add these claims is denied because of their untimeliness, pursuant to the court's previous observations.

For the aforementioned reasons, it is hereby

ORDERED that the movant's motion (Docs. 12, 15) to set aside or reconsider the court's memorandum and order and/or permit the filing of a supplemental motion under 28 U.S.C. § 2255 is DENIED. It is further

ORDERED that movant's "Supplemental Motion" (Docs. 10, 14) to vacate and/or set aside conviction and sentence pursuant to 28 U.S.C. § 2255 is hereby STRICKEN. It is further

ORDERED that the movant's claims relating to the footprint evidence discovered by the Gladstone Police Department are DENIED. The clerk is directed to enter judgment for respondent and against movant.

HOWARD F. SACHS
UNITED STATES DISTRICT [*32] JUDGE

July 25, 2001

Kansas City, Missouri

APPENDIX ITEM B-1

John A. Mandacina v. United States,
328 F.3d 995 (8th Cir. 2003)

APPENDIX B

JOHN A. MANDACINA,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 02-1685

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

328 F.3d 995; 2003 U.S. App. LEXIS 9460

December 9, *2002*, Submitted

May *16, 2003*, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by *Mandacina v. United States,* 2003 U.S. App. LEXIS 14614 (8th Cir., July 22, 2003)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Missouri. *Mandacina v. United States*, 2001 U.S. Dist. LEXIS 10971 (W.D. Mo., July 25, 2001)

United States v. McGuire, 45 F.3d 1177, 1995 U.S. App. LEXIS 537 (8th Cir. Mo., 1995)

DISPOSITION: Affirmed.

COUNSEL: For John A. Mandacina, Movant Below - Appellant: David B.B. Helfrey, Mark W. Hagemeister, HELFREY & SIMON, St. Louis, MO.

John A. Mandacina, Movant Below - Appellant, Pro Se, Leavenworth, KS.

For United States of America, Respondent - Appellee: Paul S. Becker, U.S. ATTORNEY'S OFFICE, Kansas City, MO.

JUDGES: Before BOWMAN, MORRIS SHEPPARD ARNOLD, and RILEY, Circuit Judges.

OPINION: [*997] PER CURIAM.

A jury convicted John A. Mandacina (Mandacina) of conspiracy, retaliating against an informant, interstate murder-for-hire, and use of a firearm during a crime of violence. The district court sentenced Mandacina to life imprisonment. We affirmed. *United States v. McGuire,* 45 F.3d 1177 (8th Cir. 1995). Mandacina [*998] filed a motion and supplemental motion pursuant to 28 U.S. C. § 2255 (2000), raising multiple Brady claims and ineffective assistance of counsel claims. The district court n1 denied the original motion, and dismissed as untimely the claims in the supplemental motion. Mandacina appeals. We affirm the judgment below.

n1 The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

[**2]

I. BACKGROUNDn2

n2 A detailed factual summary is provided in *McGuire*, 45 F.3d at 1180-82.

Larry Strada (Strada) provided information to the Federal Bureau of Investigation (FBI) implicating Mandacina in illegal gambling operations in the Kansas City area. On May 3, 1990, Mandacina pled guilty to charges of conducting an illegal gambling business and was sentenced to twelve months imprisonment. Thirteen days later, Strada was gunned down outside

his home. The gunman did not remove Strada's jewelry, cash or bank bag. The FBI later assumed control of the murder investigation.

In December 1990, Mandacina's co-defendant, Patrick McGuire (McGuire), and his brother-in-law, Terry Dodds (Dodds), were arrested for bank robbery. Dodds later cooperated with the FBI, and implicated Thomas Earlywine (Earlywine) in several unsolved bank robberies. After the arrest, Earlywine also cooperated with the FBI. Both Dodds and Earlywine implicated Mandacina in Strada's murder. Dodds told the FBI he had [**3] overheard a conversation in which Mandacina said he wanted somebody killed for implicating him in criminal activity. Earlywine told the FBI that, in May 1990, Mandacina said he wanted Strada killed and offered to pay McGuire $25,000 to kill Strada.

The FBI also interviewed Frank Angotti (Angotti), a long-term acquaintance of McGuire. Angotti told the FBI he met McGuire for a drink in July 1990. During the meeting, Angotti asked McGuire, "Well, I hear that you did Larry. Did you do Larry?" Angotti told the FBI McGuire responded, "Yes." The government charged Mandacina with conspiracy, retaliating against an informant, interstate murder-for-hire, and use of a firearm during a crime of violence.

On August 16, 1993, approximately three weeks before trial, government counsel sent Mandacina's trial counsel a report of a May 19, 1990, interview with Donna Borland (Borland Report). The Borland Report consists of six pages of notes taken during an interview of Borland by two Gladstone, Missouri, police detectives. According to the Borland Report, Borland told the detectives Strada was involved in "fronting money for others to buy drugs." When the detectives asked Borland "why or who might [**4] have killed" Strada, Borland

told them it was done because [Strada] had turned some information and names over to the authorities in reference to the buying and selling of drugs." Borland did not provide the detectives with specific names, but said "they were some of the people... mentioned earlier" by the detectives. The detectives had previously read Borland a list of names collected in the investigation. Near the end of the interview, Borland told the detectives that "6 or 7 people [were] indicted and this was done within the past several months." Borland also told detectives they needed "to identify and talk with these people, as this is probably where the 'hit' came from."

The record does not reveal whether Mandacina's trial counsel reviewed or investigated the Borland Report or sought additional discovery during the three weeks before trial, which began on September [*999] 7, 1993. A jury convicted Mandacina on all counts, and he was sentenced to life imprisonment. After this court affirmed his conviction and sentence, *McGuire*, 45 F.3d at 1190, Mandacina filed a habeas motion alleging (1) the government failed to disclose exculpatory evidence, (2) Mandacina [**5] received ineffective assistance of counsel, and (3) newly discovered evidence required Mandacina's convictions be vacated. After carefully reviewing these claims, the district court dismissed all claims, except the newly discovered evidence claims relating to footprints discovered at the crime scene. The district court allowed additional discovery on these claims.

On September 27, 2000, twenty days after the district court dismissed all the original claims, except the footprint evidence claims, Mandacina sought leave to file a supplemental section 2255 motion. After allowing discovery, the district court determined the original claims relating to footprint evidence lacked merit, and

the newly asserted claims in the supplemental motion were untimely and should be stricken.

On March 4, 2002, the district court granted, in part, Mandacina's extensive application for a certificate of appealability. The court certified two issues for appellate review, one relating to a claim of ineffective assistance of counsel in failing to investigate the Borland Report, and the other relating to the failure to disclose or develop impeachment from Angotti's testimony, whether treated as a Brady [**6] violation or an ineffective assistance of counsel claim.

II. DISCUSSION

On appeal, Mandacina raises three issues, which are not necessarily consistent with the certificate of appealability. First, Mandacina contends the government violated *Brady v. Maryland,* 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) and *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972) by failing to provide him with the names of alternate suspects with strong motives to murder Strada, and by failing to disclose evidence proving Angotti, a key prosecution witness, was forced to testify. Second, Mandacina claims his trial attorney failed to investigate alternate suspects and failed to compel the government to release information on other suspects in violation of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Third, Mandacina claims his amended motion was timely filed pursuant to 28 U.S.C. § 2255(2) and (4), because the newly asserted claims related back to the original motion, the government prevented him from bringing timely claims, and certain evidence was [**7] only recently discoverable through diligent investigation. Alternatively, Mandacina argues, if subsections 2255(2) and (4) are inapplicable, the statute should be equitably tolled due

to circumstances beyond his control and because his newly asserted claims satisfy the "actual innocence" standard.

Initially, we note the Brady and ineffective assistance claims raised here were not previously raised in the original section 2255 motion. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a section 2255 motion must be filed within one year of the date the conviction becomes final, except in circumstances not present here. 28 U.S.C. § 2255. While Mandacina's original motion was timely filed, his supplemental motion, filed three years later, was not. Therefore, the supplemental motion is time-barred, unless Mandacina can satisfy a relation back analysis.

Pursuant to the Federal Rules of Civil Procedure, relation back of amendments filed after the period of limitations [*1000] is permitted in certain instances. n3 The relation back doctrine allows untimely claims to be deemed timely by treating the claims as if they had been filed when the timely [**8] claims were filed. *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000). "An amendment to a pleading shall 'relate back' to the date of the original pleading only if the claim asserted in the original pleading and the claim asserted in the amended pleading arose out of the same conduct, transaction, or occurrence." *United States v. Craycraft,* 167 F.3d 451, 457 (8th Cir. 1999) (citing Fed. R. Civ. P. 15(c)(2)). "The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." Id. (citations omitted). Thus, only if the Brady claims and the ineffective counsel claims alleged in Mandacina's supplemental section 2255 motion can be said to have arisen out of the same set of facts as his original claims

will they relate back for purposes of deeming the claims timely filed. We review a district court's application of *Rule 15(c)* for an abuse of discretion. See *Craycraft,* 167 F. 3d at 457 n.6; *Davenport*, 217 F. 3d at 1343 n.4.

> n3 Habeas proceedings are civil in nature; therefore, the Federal Rules of Civil Procedure apply. *United States v. Craycraft,* 167 F.3d 451, 457 n.6 (8th Cir. 1999).

[**9]

A. Borland Report

1. Amended Brady Claim

In analyzing whether the two Borland Report claims-one raised as a Brady violation claim, and another raised as an ineffective assistance claim-relate back to the original section 2255 motion, the district court recognized the determination presented "a reasonably close question." The district court explained Mandacina's original motion alleged the government failed to disclose exculpatory evidence, "including various physical and other evidence obtained by the Gladstone Police Department and detectives involved in the investigation of Mr. Strada's murder." The original motion also alleged:

> The Government failed to properly disclose . . . any and all information related by Mr. Strada prior to his death in which Mr. Strada implicated any other person in any criminal activity, including any organized crime-related activity. Such information constitutes favorable and exculpatory information in that it establishes a motive for others besides Movant Mandacina to have killed or conspired to kill Mr. Strada.... There is a strong factual basis to support a defense theory... that Mr. Strada was

> killed not [**10] because of any statements he may have made regarding Movant Mandacina, but instead was killed by others who had a much stronger motive to retaliate against Mr. Strada.

The district court found the original and amended Brady claims both related to evidence obtained by Gladstone Police Department and were factually similar in terms of both "time and type," citing *Craycraft,* 167 F. 3d at 457. However, the district court concluded the amended Brady claim did not relate back to the original motion because the original motion made no mention of the Borland Report, and contained only generalized assertions that evidence obtained by the Gladstone Police Department was withheld. The district court declared "it is insufficient that the amended claims and the original ones are both Brady claims, just as it was insufficient in Craycraft that both sets of claims alleged ineffective assistance of counsel."

On this claim, the district court construed Craycraft too narrowly and committed an abuse of discretion. In Craycraft, this court determined the "original complaint alleged deficiencies of representation [*1001] distinctly separate from the deficiency alleged [**11] in his amendments." We explained that an attorney's failure to file an appeal represents a "separate occurrence in both time and type" from an attorney's failure to pursue a downward departure for substantial assistance or an attorney's failure to object to the type of methamphetamine. We explained this was so because the original petition alleging an ineffective assistance of counsel claim for failure to file an appeal would unlikely provide notice of "such a different sort of theory." Craycraft, 167 F.3d at 457.

Unlike Craycraft, Mandacina's original section 2255 motion does not allege Brady violations separate and

distinct from the violation alleged in the supplemental motion. Although Mandacina's original motion did not refer specifically to the Borland Report, the original motion referred to Brady violations involving the government's failure to disclose "any and all' investigative information obtained by Gladstone Police Department detectives supporting a defense theory that, before he died, Strada implicated other persons involved in organized criminal activity who possessed a stronger motive than Mandacina to retaliate against Strada. The Brady [**12] claims in the original section 2255 motion referring to evidence of other suspects obtained by the Gladstone Police Department satisfy Rule 15(c) by providing the government with the notice that the statutes of limitation were intended to provide. As such, we conclude the amended Brady claim, alleging the government failed to disclose the Borland Report, relates back to the original motion.

Having determined the amended Brady claim concerning the Borland Report relates back to the original section 2255 motion, we proceed to review the district courts rejection of the claim. Ordinarily, we would remand the claim. However, the district court analyzed the merits of the amended Brady claim based on the Borland Report under 28 U.S.C. § 2255(2) and (4), as well as under the "actual innocence" standard set forth in *Schlup v. Delo*, 513 U.S. 298, 130 L Ed. 2d 808, 115 S. Ct. 851 (1995). 'We review de novo allegations of Brady violations." *United States v. McElhiney*, 275 F.3d 928, 932 (10th Cir. 2001) (citation omitted).

To succeed on his amended Brady claim, Mandacina must establish (1) the prosecution suppressed [**13] evidence, (2) "the evidence was favorable to him," and (3) "the evidence was material to either his guilt or his punishment." *United States v. Carman*, 314 F.3d 321,

323-24 (8th Cir. 2002). To establish materiality in the context of Brady, "the accused must show there is a reasonable probability that if the allegedly suppressed evidence had been disclosed at trial the result of the proceeding would have been different." *Drew v. United States,* 46 F.3d 823, 828 (8th Cir. 1995). "A 'reasonable probability' is a probability sufficient to undermine the reviewing court's confidence in the outcome of the proceeding." *Id.*

Following the magistrate judge's pretrial, *in camera* inspection of the police file, the government disclosed the Borland Report to Mandacina's trial counsel on August 16, 1993, approximately three weeks before trial began. Mandacina contends that, in addition to producing the actual Borland Report, the government had a duty to disclose the names of all suspects with strong motives to murder Strada, as well as all facts developed in the investigation of these suspects. The district court properly rejected this argument, declaring [**14] "evidence that a movant can discover through his own reasonable investigation is not illegally withheld by the Government within the meaning of § 2255(2), or under Brady," citing *United States v. Jones, 160* F.3d 473, 479 (8th Cir. 1998). [*1002] The district court correctly ruled nothing prevented Mandacina from conducting an expedited investigation of the Borland Report and, if necessary, requesting the trial be continued to allow for more investigation. Because the government did not suppress the Borland Report, Mandacina cannot prove a Brady violation.

2. Amended Ineffective Assistance Claim

The more difficult question presented on appeal is whether the amended ineffective assistance of counsel claim based on the Borland Report relates back to the ineffective assistance claims contained in the original

section 2255 motion. The original section 2255 motion alleged ten claims of ineffective assistance of counsel. Only one of the ten original claims involved trial counsel's failure to discover exculpatory evidence. That particular claim alleged trial counsel failed to discover and investigate footprint evidence found at the crime scene by the Gladstone [**15] Police Department. In his original motion, Mandacina alleged that had trial counsel discovered and investigated the footprint evidence, the evidence would have revealed: (1) the footprints came from hiking boots, and (2) McGuire did not wear hiking boots, and, (3) when arrested, McGuire was not wearing hiking boots. Further, the footprints may have revealed a shoe size different from McGuire's shoe size. Such findings, Mandacina alleged, would have been favorable not only to McGuire, the convicted gunman, but derivatively to Mandacina.

While recognizing reasonable minds could differ on the issue, we conclude the district court properly interpreted Craycraft and did not abuse its discretion in finding the amended ineffective assistance of counsel claim based on the Borland Report does not relate back to the original habeas motion. The claims are not sufficiently similar in both "time and type." Although both claims relate to pretrial conduct by counsel and therefore occurred at a generally similar "time," the claims are not similar in "type." The original claim alleged a failure by counsel to *discover* allegedly exculpatory footprint evidence; whereas, the amended claim alleged [**16] a failure by counsel to *investigate* the Borland Report. We conclude the district court correctly ruled the amended ineffective assistance of counsel claim does not relate back to the original motion, and is therefore time barred.

B. Angotti Evidence

1. Amended Brady Claim

Mandacina further contends the prosecution failed to timely disclose Angotti's grand jury testimony and immunity deals and, in doing so, deprived Mandacina of his right to formulate a defense and to confront and impeach a key witness. In Mandacina's brief, Mandacina argues the original motion alleged "improper conduct in that the prosecution withheld exculpatory evidence... which could impeach the witnesses who testified as to Movant's alleged involvement in the crime. Our review of the original habeas motion reveals Mandacina did not raise a Brady claim related to the government's failure to disclose evidence which could impeach Angotti or other key prosecution witnesses. n4 Under the section alleging Brady violations, the original motion references Dodds and Earlywine, but does not allege the government withheld impeachment evidence related to them. We agree with the [**17] district court's analysis that each alleged [*1003] withholding of evidence represents a distinct act, such that the original motion does not provide fair notice of Brady claims not specifically asserted. Because the amended claim does not relate back, it is time barred.

n4 In the original motion, Mandacina primarily discussed Ms. Brock Decastrogiovannimausolf.

2. Amended Ineffective Assistance Claim

Mandacina also claims his trial counsel was ineffective in cross-examining Angotti and Earlywine at trial. In so far as the claim alleges inadequate cross examination of Earlywine, this assertion was not raised in the original motion and is time-barred. In so far as the claim alleges inadequate cross examination of Angotti, the claim was raised in the original motion and care

fully reviewed by the district court. Angotti testified only against co-defendant McGuire, and Mandacina's counsel walked out of the courtroom with Mandacina and remained absent during Angotti's testimony. The court referred to an [** 18] affidavit prepared by trial counsel which explained counsels "decision to leave the courtroom during Mr. Angotti's testimony was based on his desire to underscore in the minds of the jury the importance of the judge's instruction that the testimony not be considered against movant," The district court concluded counsel's decision represented a sound strategy decision." We agree and affirm the dismissal of this claim.

C. Remaining Supplemental Claims

Finally, we reject Mandacina's arguments that his remaining supplemental claims, including the St. John evidence, are timely filed under section 2255(2) and (4) or that the claims relate back to the original motion. We further conclude the district court correctly found Mandacina has not established a claim of actual innocence, and therefore deny his request for equitable tolling. See 8th Cir. R. 47B.

IV. CONCLUSION

For the reasons set forth above, we affirm the district court's dismissal of the original section 2255 motion and the supplemental section 2255 motion.

APPENDIX ITEM C-1

John A. Mandacina v. United States, 2003 U.S. App. Lexis 14614 (8th Cir. 2003)

Order of the United States District Court of Appeals for the Eighth Circuit

July 22, 2003

(denying Petition for Rehearing and for Rehearing En Banc)

APPENDIX C

JOHN A. MANDACINA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 02-1685

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2003 U.S. App. LEXIS 14614

July 22, 2003, Decided

PRIOR HISTORY: [*1] Order Denying Petition for Rehearing and for Rehearing En Banc *Mandacina v. United States, 328 F.3d 995, 2003 U.S. App. LEXIS 9460 (8th Cir. Mo., 2003)*

OPINION: The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 22, 2003